

11-28-2011

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Recommended Citation

Roger Williams University School of Law, "Newsroom: Yelnosky on Pension Reform Debate" (2011). *Life of the Law School (1993-)*. 227.
https://docs.rwu.edu/law_archives_life/227

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Newsroom

Yelnosky on Pension Reform Debate

Professor Michael Yelnosky discusses possible trajectories for litigation surrounding Rhode Island's unprecedented pension reform efforts.

From **PROVIDENCE BUSINESS NEWS, Focus: LAW Edition: "Courts to decide winner of R.I. pension debate"** by Patrick Anderson



Nov 28, 2011: Recent scenes of jubilation at the Statehouse notwithstanding, real victory in the battle over pension reform won't be decided until a judge declares a winner.

Even before lawmakers recently passed a sweeping overhaul of the state's retirement system, lawyers and operatives on both sides of the pension issue have been honing and testing their legal arguments on the matter for years.

Now that the legislative process has run its course, a court case filed the last time lawmakers made changes to the state retirement system returns to the spotlight, while reform advocates await a fresh legal challenge to the new pension law promised by unions.

Created with a keen awareness for the legal challenges ahead, the new pension law casts the pension changes as "emergency" measures, makes a point of asking for sacrifices from all stakeholders and suspends annual cost-of-living adjustments – or COLA – only until plans are 80 percent funded.

The changes are designed to cut \$3 billion in unfunded pension liabilities by scaling back benefits for state employees, teachers and municipal workers.

The reform bill, signed into law Nov. 18 by Gov. Lincoln D. Chafee, is projected to save the state \$275 million in next year's budget and several billion dollars over the next decade.

The suspension of COLAs is seen by unions as an unfair reduction in previously approved benefits.

"This is the first time in our state benefit reductions have happened to people who are retired," Rhode Island AFL-CIO President George Nee told the Greater of Providence Chamber of Commerce the morning after the initial pension-reform bill was released to the public. "I expect the final disposition will end up in court."



Roger Williams University Law Professor Michael

Yelnosky expects the new bill will produce its own court case, one that, even if it moves through the Rhode Island court system, will be watched closely throughout the country.

"Assuming they don't go to federal [court, the potential case] will have no binding impact, but it could be influential to other courts," **Yelnosky said**. "Judges will be seeing this is what Rhode Island did and we are either persuaded by it or not. Being first means the resolution probably will have more influence."

The legal fight over the government's power to rewrite its pension laws to reduce the benefits for current and former workers has been going on in Rhode Island for some time.

Cities like Providence and Cranston have tried to scale back the benefits promised in their own independent plans, only to see those changes struck down in a courtroom.

But changing the state retirement plans, which are defined in law instead of union contracts, is a different matter.

When lawmakers in 2008 made changes to retiree health-insurance plans, public-sector unions challenged them in U.S. District Court, but their suit failed after Judge William Smith ruled in favor of the government last year.

In 2009, the General Assembly passed changes to the rules governing minimum retirement age and the formulas for calculating employees' achieved salary.

This time the unions, led by Council 94 of the American Federation of State, County and Municipal Employees, challenged those changes in state Superior Court.

In September, as Treasurer Gina Raimondo worked on her pension bill, Superior Court Judge Sarah Taft-Carter denied a motion by the government to throw out the union lawsuit on the grounds that the pension laws do not establish a contractual agreement.

The decision not to dismiss meant Taft-Carter was open to deciding the other major questions of the case, including whether the changes significantly impair the contract and whether, even if they do, the changes serve an overarching public good impossible to achieve otherwise.

Before the case could continue, the state appealed the decision to the state Supreme Court, which last week declined to hear the state's appeal. The decision means the case will now return to Superior Court.

The intense debate on Smith Hill over the new pension-overhaul bill has prompted groups across the country to weigh in on or handicap the legal fight.

In a report on the Rhode Island retirement system released in November, Education Sector, a reform-oriented Washington think tank, took a hedged stance on whether changes to pension plans such as the cost-of-living increase suspension will stand up under state law.

"The Rhode Island Supreme Court has ruled that individuals who retire while a COLA provision is in effect are entitled to that COLA for the duration of their retirement, and such adjustments cannot be reduced or eliminated," the Education Sector report said. "It is important to note, however, that it is possible for the

state to exercise its police power to reduce COLAs where such reductions are reasonable and necessary to achieve an important public purpose.”

On the question of whether the measures in the Raimondo plan would be allowed under the state’s police powers, Education Sector pointed to a Minnesota court case in which similar “emergency” pension changes were upheld in court.

“In Minnesota, the court held that the state was permitted to temporarily reduce the COLA or public-employee pensions as part of a broad plan to address plan underfunding pursuant to its police power,” Education Sector wrote. “The court rejected the argument that the state needed to pursue other remedies, such as raising taxes, before reducing retirees’ COLAs.”

As for his prediction on how the legal battle will end up, **Yelnosky at Roger Williams said** he thinks the current union suit over the 2009 pension changes faces an “uphill battle.”

In her September ruling, Carter-Taft “makes it clear that all she is saying is these statutes implicate the contract clause,” **Yelnosky said**. “She made a conscious decision to include that she thinks that, even having ruled for the plaintiffs, they face a tough road.”

On whether current trends in labor law favor the government or unions, **Yelnosky said** there is little precedent for changes like the ones made by the recent pension law.

“This is completely uncharted territory,” **Yelnosky said**.

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